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Appendix A: Denial of Hearing in the California Supreme  
Court

CLERK'S OFFICE, SUPREME COURT  
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SAN FRANCISCO, CALIFORNIA 94102

**APR 21 1982**

I have this day filed Order \_\_\_\_\_

**HEARING DENIED**

In re: 4 Crim. No. 12479

People

vs.

Timothy W. Underwood

*Respectfully,*

Clerk

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Appendix B: Opinion of the Court of Appeal of the State  
of California, Fourth Appellate District, Division Two

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, )

Plaintiff and Respondent, )

v. )

TIMOTHY WILLIAM UNDERWOOD, )

Defendant and Appellant. )

4 Crim. 12479  
(Super.Ct.No. SCR 36995)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County.  
Don A. Turner, Judge. Affirmed.

Dolan, Sanders & Mogin, John P. Dolan and Judith A.  
Sanders for Defendant and Appellant.

George Deukmejian, Attorney General, and Steven H.  
Zeigen, Deputy Attorney General, for Plaintiff and Respondent.

Defendant was convicted of second degree murder and  
the jury found true the allegation he used a firearm, within  
the meaning of Penal Code section 12022.5, during the commission  
of the offense. His only claim of error on appeal is that the  
trial court failed to instruct the jury on the lesser included  
offense of voluntary manslaughter. The court did not so instruct,  
because it found that the statute of limitations barred a prosecu-  
tion for manslaughter and that there was insufficient evidence to

support a charge of manslaughter. We affirm, because we agree that there is not enough evidence to require the giving of the requested jury instruction.

#### FACTS

On November 9, 1976, an unidentified body, wrapped in linens which were tied with nylon strapping, was discovered inside a large plastic trash bag buried in a shallow grave near Cajon Pass in San Bernardino County. An autopsy failed to reveal the victim's identity. The body was tagged John Doe No. 15-76 (hereafter John Doe).

The pathologist who performed the autopsy on John Doe formed the opinion that death was caused by a gunshot wound to the base of the skull and had occurred from two weeks to four months prior to the discovery of the body.

In mid-1975 Diane Langley began living with defendant. When she left defendant in June 1976, she moved in with her father. Defendant moved in with the victim, John David Watson, Jr. Diane dated Watson for one and one-half months, and then dated both men for a short period of time.

During the latter period of time, defendant and Watson began to say negative things about each other to Diane. At one point the two men were not speaking to one another. Diane stopped seeing both men during the latter part of August 1976 because she did not like the rivalry that had developed between the two men. She never saw David Watson again.

Several weeks later, Diane observed defendant driving Watson's blue van. When she asked defendant what had become of Watson, defendant replied Watson had gone "bye bye," he would not be found for a long time, he did not know what hit him, he did not feel any pain, and "It was a crime of passion."

In July 1979, Beverly Ann Whittenberg went to the San Bernardino County Sheriff's Department to report her brother John David Watson, Jr. missing. She spoke with Detectives Bill Arthur and James Bailey. During the ensuing investigation, John Doe was exhumed and identified as John David Watson, Jr.

Defendant was charged with Watson's murder (Pen. Code, § 187) in an information filed on June 16, 1980. He was convicted of second degree murder and the jury found true the allegation he used a firearm within the meaning of Penal Code section 12022.5 during the commission of the offense. He appeals from this judgment.

#### DISCUSSION

A court has the duty to instruct the jury on every material question upon which there is any evidence deserving of any consideration whatever. Such evidence, however, must be substantial. There is no obligation to instruct on a particular theory of the case if the evidence supporting that theory is minimal and insubstantial. (People v. Flannel (1979) 25 Cal.3d 668, 684-685.)

Defendant sought to have the jury instructed on the crime of manslaughter. The trial court refused to give manslaughter

instructions, because, inter alia, there was no substantial evidence to support that theory of the case. We agree.<sup>1/</sup>

The difference between murder and manslaughter is that murder is the unlawful killing of a human being with malice aforethought (Pen. Code, § 187) while manslaughter is the same killing done without malice (Pen. Code, § 192). Therefore, it is voluntary manslaughter, but not murder, when the killing is done either upon a sudden quarrel or heat of passion. (Id.)

In the present case, there is no substantial evidence that the killing was done upon a sudden quarrel or heat of passion. The only evidence that remotely supports such a theory is that defendant, the victim, and Diane Langley had in the past been involved in a "love triangle" and that defendant told Diane that it was a crime of passion. This is minimal evidence that the killing occurred because of their male rivalry and does not even assert a sudden quarrel or heat of passion. It tells the jury nothing about the events contemporaneous with the victim's death. To arrive at a manslaughter verdict, the jury would have had to engage in sheer

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<sup>1/</sup> Because we affirm on the lack of substantial evidence grounds, we need not decide the propriety of the trial court's alternate ruling that manslaughter instructions were improper since a conviction for manslaughter was barred by the statute of limitations.

It is uncertain whether a defendant is entitled to an instruction on a lesser included offense that is time-barred. One case held that there is no such right (People v. Vallerger (1977) 67 Cal.App.3d 847, 882-883), while another case indicated that the right did exist (People v. Morgan (1977) 75 Cal.App.3d 32, 37, fn. 1; see also Keeble v. United States (1973) 412 U.S. 205 [36 L.Ed.2d 844, 93 S.Ct. 1993]; Padie v. State (Alaska 1976) 557 P.2d 1138.)

speculation. The trial court was thus correct in not giving manslaughter instructions to the jury.

The judgment of conviction is affirmed.

/s/ Morris  
Acting P. J.

We concur:

/s/ McDaniel  
J.

/s/ Gardner  
J.\*

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\*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Appendix C: Constitutional Provisions

**AMENDMENT 6**

**Rights of the accused.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**AMENDMENT 14**

**Section 1. Citizens of the United States.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



Appendix D: Order for Resubmission by the Court of Appeal  
of the State of California

**COPY**  
COURT OF APPEAL—STATE OF CALIFORNIA

COURT OF APPEAL - FOURTH DIST.  
FOURTH APPELLATE DISTRICT **FILED**

DEC 31 1981

DIVISION TWO

RICHARD J. SMITH, ACTING <sup>Clerk</sup>  
Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA,  
Plaintiff and Respondent,  
vs.  
TIMOTHY WILLIAM UNDERWOOD,  
Defendant and Appellant.

4 Crim. NO. 12479  
COUNTY NO. SCR 36995

THE COURT:

Pursuant to Rule 22.5, California Rules of Court, the submission is hereby vacated and the cause resubmitted as of this date.

The reason submission is vacated is that differences of opinion among the judges on the panel to which the cause was submitted have not been resolved. Additional time will be required for the purpose of preparing modification of the proposed opinion and the possible preparation of a separate opinion.

I concur:

/s/ McDaniel

J.

C.C.

/s/ Morris

Acting

Presiding Justice



VERIFICATION BY PARTY (446, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am the

in the above entitled action; I have read the foregoing

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on \_\_\_\_\_ at \_\_\_\_\_, California  
(date) (place)

Signature

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

1072 S. E. Bristol, Santa Ana, CA 92707

On June 19, 1982, I served the within Petition for Writ of

Certiorari

on the see below

in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the

United States mail at Placentia, CA  
addressed as follows:

San Bernardino Superior Court, 351 N. Arrowhead Ave, San Bernardino, CA 92415

San Bernardino District Attorneys Office, 351 N. Arrowhead Ave., San Bernardino, CA 92415

Attorney General's Office, 110 W. "A" Street, Ste. 600, San Diego, CA 92101

Court of Appeal, Fourth District, Div. Two, 640 State Bldg., 303 W. Third St., San Bernardino, CA 92401

Supreme Court of California, 4250 State Bldg., 350 McAllister St., San Francisco, CA 94102

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on June 19, 1982 at Placentia, California  
(date) (place)

Signature